68 FLRA No. 108

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2058
(Union)

and

UNITED STATES
DEPARTMENT OF THE INTERIOR
NATIONAL PARK SERVICE
INDEPENDENCE NATIONAL HISTORICAL PARK
PHILADELPHIA, PENNSYLVANIA
(Agency)

0-NG-3234

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DECISION AND ORDER
ON NEGOTIABILITY ISSUES

June 11, 2015

_____

Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella dissenting in part)

I. Statement of the Case

This negotiability case involves whether five provisions of an agreement, disapproved by the Agency head under § 7114(c) of the Federal Service Labor-Management Relations Statute (the Statute),[1] are contrary to law.

Provision 1 restricts the Agency's use of security cameras. The second numbered sentence of Provision 1 (Sentence 2) prohibits "routine surveillance of employees at duty stations."[2] For the reasons set forth below, we find that Sentence 2 conflicts with the Agency's internal-security practice of using security cameras "to detect, document[,] and prevent" criminal activity,[3] and that it is not a procedure or appropriate arrangement under § 7106(b) of the Statute. Therefore, we find that Provision 1 as a whole – and Sentence 2, as severed from the rest of Provision 1 – are contrary to law.

The third numbered sentence of Provision 1 (Sentence 3) prohibits the Agency from using security-camera footage for "performance monitoring."[4] And Provision 1's concluding, unnumbered sentence (Sentence 4) clarifies that the Agency may nevertheless use security-camera footage to "conduct administrative or criminal investigations," to "support . . . disciplinary action[s]," "in matters referred to the Office of the Inspector General[,] . . . [or] for criminal prosecution."[5] Considering these sentences together (Sentences 3-4), for the reasons set forth below, we find that the Agency has not established that Sentences 3-4 – as severed from the rest of Provision 1 – affect management's right to determine internal-security practices.

Provisions 4 and 5 concern workplace safety. Because the Union does not dispute the Agency's claim that these provisions are contrary to management's right to assign work under § 7106(a)(2)(B) of the Statute,[6] and does not support its claim that the provisions are lawful because they concern permissive subjects of bargaining under § 7106(b)(1) of the Statute,[7] we find that Provisions 4 and 5 are contrary to law.

Provision 6 concerns granting employees leave to engage in certain activities. We must determine whether the provision is contrary to management's right to assign work under § 7106(a)(2)(B) of the Statute.[8] Because the Agency's management-rights argument is based on a misinterpretation of the meaning and operation of Provision 6, we find that the Agency has not established that Provision 6 conflicts with § 7106(a)(2)(B).

Finally, Provision 3 prohibits the Agency from terminating automatic dues deductions for employees who leave one bargaining unit and join a different bargaining unit. Under § 7115(b)(1) of the Statute,[9] an agency must stop automatically deducting union dues from the pay of any employee who leaves a bargaining unit. Accordingly, we find that Provision 3 conflicts with § 7115(b)(1).

II. Background

After the parties executed an agreement, the Agency head disapproved several provisions under § 7114(c) of the Statute.[10] Subsequently, the Union filed a negotiability appeal (petition) under § 7105(a)(2)(E) of

[1] 5 U.S.C. § 7114(c).
[2] Pet. at 8.
[3] Agency's Statement (Statement) at 5.
[4] Pet. at 8.
[5] *Id.*
[6] 5 U.S.C. § 7106(a)(2)(B).
[7] *Id.* § 7106(b)(1).
[8] *Id.* § 7106(a)(2)(B).
[9] *Id.* § 7115(b)(1).
[10] *Id.* § 7114(c).

the Statute,[11] concerning six provisions, five of which are still in dispute (Provisions 1, 3, 4, 5, and 6). The Authority conducted a post-petition conference (the conference); the Agency filed a statement of position (statement); the Union filed a response (response); and the Agency filed a reply to the Union's response (reply).

The Agency argues that Provisions 1, 4, 5 and 6 are contrary to management's rights under § 7106(a) of the Statute, and that Provision 3 conflicts with § 7115(b)(1) of the Statute. Because the Agency's arguments concerning Provisions 1, 4, 5, and 6 all raise issues regarding § 7106, we address those provisions before turning to the issue of whether Provision 3 conflicts with § 7115(b)(1).

III. Provision 1

A. Wording

> Article 2 – Section 3 N
>
> N. Security Cameras
>
> 1. Security cameras will not be located in restrooms or locker rooms or other areas and rooms used by employees for dressing and taking care of personal needs.
>
> 2. Security cameras will not be used for routine surveillance of employees at duty stations or break areas.
>
> 3. Security cameras will not be used for performance monitoring.
>
> This provision in no way restricts management's rights: (a) to use video surveillance to conduct administrative or criminal investigations; (b) to use such surveillance footage in connection with or in support of disciplinary action; and/or (c) to use such surveillance footage in matters referred to the Office of the Inspector General and/or for criminal prosecution.[12]

B. Meaning

The Agency does not argue that either the first numbered sentence of Provision 1 (Sentence 1), or Sentence 4, is contrary to law; rather, the Agency argues only that Sentences 2 and 3 are contrary to law.[13] Sentence 2 prohibits the Agency from using security cameras "for routine surveillance of employees at duty stations or break areas."[14] At the conference, the parties agreed that this sentence prevents management from using security cameras "to manage employees."[15] And the parties agree that Sentence 3 – which prohibits the use of security cameras for "performance monitoring"[16] – prevents "management from using security footage to appraise employee performance."[17]

C. Analysis and Conclusions

The Agency argues that Provision 1 is contrary to the Agency's right to determine internal-security practices under § 7106(a)(1) of the Statute.[18] As a general matter, agencies have certain management rights under § 7106(a), but § 7106(b) provides exceptions to those rights.[19] In order for an agency to demonstrate that a proposal or provision is contrary to § 7106, the agency must allege and demonstrate that the proposal or provision affects a management right.[20] If the agency does so, then the Authority will next examine any union arguments that the proposal or provision falls within an exception set forth in § 7106(b).[21]

1. Provision 1 affects management's right to determine internal-security practices.

Based on Sentences 2 and 3 of Provision 1,[22] the Agency contends that Provision 1 affects management's right to determine internal-security practices under § 7106(a)(1) of the Statute.[23] The right to determine internal-security practices includes the authority to determine the policies and practices that are part of an agency's plan to secure or safeguard its personnel,

[11] *Id.* § 7105(a)(2)(E).
[12] Pet. at 8.
[13] Statement at 3.
[14] Pet. at 8.
[15] Record of Conference (Record) at 2.
[16] Pet. at 8.
[17] Record at 2.
[18] Statement at 4.
[19] 5 U.S.C. § 7106(a)-(b).
[20] *E.g.*, *AFGE, Local 3928*, 66 FLRA 175, 179 n.5 (2011); *NFFE, Fed. Dist. 1, Local 1998, IAMAW*, 66 FLRA 124, 128 n.7 (2011).
[21] *E.g.*, *AFGE, Council of Prison Locals 33, Local 506*, 66 FLRA 929, 931-32 (2012) (*Local 506*).
[22] *See* Statement at 2 (clarifying that Agency's contrary-to-law allegation pertains only to Sentences 2 and 3 of Provision 1).
[23] *Id.* at 4.

physical property, or operations against internal and external risks.[24] The Authority has concluded that where an agency shows a link or reasonable connection between its security objective and a policy or practice designed to implement that objective, a provision that conflicts with the policy or practice affects management's right to determine internal-security practices.[25] And once a link has been established, the Authority will not review the merits of an agency's policy or practice in the course of resolving a negotiability dispute.[26]

The Agency at issue here, Independence National Historic Park, includes a number of historic tourist attractions, including the Liberty Bell, the Ben Franklin Museum, and Independence Hall.[27] The Agency asserts that "[p]roviding a safe environment for employees and visitors and providing protection for the resources of the park are fundamental security objectives" of the Agency, and that security cameras "are a critical component" of the Agency's internal-security program.[28] According to the Agency, security cameras are "intended to detect, document[,] and prevent criminal activity," and this requires that "cameras routinely monitor many locations where bargaining[-]unit employees . . . work."[29] For example, the security cameras monitor locations where bargaining-unit employees collect or count government funds, such as museum fees.[30] And, according to the Agency, on at least one occasion, security cameras have recorded an employee stealing from a donation box.[31] Consequently, the Agency claims, Sentence 2's prohibition against "routine surveillance of employees at duty stations"[32] conflicts with the Agency's practice of monitoring employees' duty stations.

The Union asserts that Provision 1 "has nothing to do with . . . internal security,"[33] and that the Union does not "challenge[] the [A]gency's use of [security] cameras for law[-]enforcement purposes."[34] However, the Union does not explain how Sentence 2's prohibition of using security cameras for "routine surveillance of employees at duty stations"[35] permits the Agency to achieve its objective of using security cameras to "detect, document[,] and prevent criminal activity" throughout the park, including in areas where employees collect and count money.[36] Relatedly, although Sentence 4 preserves management's right to use security-camera *footage* to "conduct administrative or criminal investigations," to "support . . . disciplinary action[s]," "in matters referred to the Office of the Inspector General[,] . . . [or] for criminal prosecution,"[37] that sentence does not resolve the conflict between the Agency's surveillance practice and Sentence 2's prohibition on routine *surveillance*.

Based on the foregoing, we find that the Agency has established a reasonable link between its practice of using security cameras to routinely monitor employee duty stations and its internal-security objectives. And because, as discussed above, Sentence 2 of Provision 1 would prohibit the Agency from using cameras for "routine surveillance of employees at duty stations,"[38] we find that Provision 1 conflicts with the Agency's practice and, thus, affects management's right to determine internal-security practices.

2. The Union does not establish that Provision 1 is a procedure under § 7106(b)(2) of the Statute.

The Union argues that Provision 1 is a procedure under § 7106(b)(2) of the Statute because, "[w]ithout the limitations embodied in the provision, the [A]gency will exceed its proper authority to determine internal[-]security practices and impermissibly use the cameras" for purposes "other than internal security," such as "employee[-]performance monitoring."[39] In contrast, the Agency argues that because Provision 1 prohibits the Agency from using security cameras to monitor employees' duty stations, the provision "prevents the Agency from . . . implementing an integral component of its internal-security program," and, therefore, is not a procedure under § 7106(b)(2).[40]

Under § 2424.25(c)(1)(ii) of the Authority's Regulations, an exclusive representative must set forth its arguments and authorities supporting any assertion that its provision constitutes an exception to management rights, including "[w]hether and why the . . . provision constitutes a negotiable procedure as set forth in . . . [§] 7106(b)(2)."[41] Where a union argued only that failure to implement an alleged procedure would have a "significant impact" on employees, the Authority held that this argument was insufficient to establish that the

[24] *AFGE, Fed. Prison Council 33*, 51 FLRA 1112, 1115 (1996).
[25] *E.g.*, *Local 506*, 66 FLRA at 931.
[26] *Id.*; *AFGE, Local 2143*, 48 FLRA 41, 44 (1993) (*Local 2143*) (Member Talkin concurring).
[27] Statement at 5.
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.* at 6.
[32] Pet. at 8.
[33] Resp. at 6.
[34] Pet. at 9.
[35] *Id.* at 8.
[36] Statement at 5.
[37] Pet. at 8.
[38] *Id.*
[39] Resp. at 6.
[40] Reply at 3.
[41] 5 C.F.R. § 2424.25(c)(1)(ii); *see also AFGE, Local 723*, 66 FLRA 639, 644 (2012) (*Local 723*).

proposal was a procedure under § 7106(b)(2).[42] Similarly, here, the Union claims that Provision 1 is a procedure, but presents no argument or authority to support that claim. Rather, the Union states only that, without implementation of Provision 1, the Agency will use security cameras in an "impermissibl[e]" manner.[43] We find that the Union's statement, standing alone, is insufficient to establish that Provision 1 is a procedure under § 7106(b)(2).[44] We further note that, because Sentence 2 essentially prohibits the Agency from implementing its chosen internal-security practice, Provision 1 does not resemble security-related proposals or provisions that the Authority has held to be procedures under § 7106(b)(2).[45]

For the foregoing reasons, we find that the Union has not established that Provision 1 is a procedure under § 7106(b)(2) of the Statute.

3. The Union does not establish that Provision 1 is an appropriate arrangement under § 7106(b)(3) of the Statute.

Where the response form that the Union filed asks whether the Union claims that Provision 1 is an appropriate arrangement under § 7106(b)(3) of the Statute, the Union responds, "Answered in [p]etition for [r]eview."[46] But the Union's petition does not argue that Provision 1 is an appropriate arrangement. Additionally, in its response, the Union does not cite § 7106(b)(3) or use the terms "appropriate" or "arrangement."[47] But, in its response, the Union does provide several arguments – discussed in greater detail below – regarding how Provision 1 relates to the alleged adverse effects of the Agency's potential use of security cameras to evaluate employee performance. We assume, without deciding, that these assertions are sufficient to *raise an argument* that Provision 1 is an appropriate arrangement. But, for the following reasons, we find that these assertions do not *establish* that Provision 1 is an appropriate arrangement.

Under § 2424.25(c)(1)(iii) of the Authority's Regulations, an exclusive representative must set forth its arguments and authorities supporting any assertion that its provision constitutes an exception to management rights, including "[w]hether and why the . . . provision constitutes an appropriate arrangement as set forth in . . . [§] 7106(b)(3)."[48] In order to be an appropriate arrangement, a provision must be both an "arrangement" and "appropriate" within the meaning of § 7106(b)(3).[49] Thus, in determining whether a provision is an appropriate arrangement, the Authority first examines whether the provision is intended as an arrangement for employees adversely affected by the exercise of a management right.[50] To establish that a provision is an arrangement, a union must identify the actual effects – or reasonably foreseeable effects – on employees that flow from the exercise of management's rights and how those effects are adverse.[51] Proposals or provisions that address speculative or hypothetical concerns do not constitute arrangements.[52] And the alleged arrangement must also be sufficiently tailored to compensate or benefit employees suffering adverse effects attributable to the exercise of management's rights.[53] In this regard, the Authority has stated that § 7106(b)(3) does not bring within the duty to bargain proposals or provisions that are so broad in their sweep that the "balm" afforded would be applied to employees indiscriminately without regard to whether the group as a whole is likely to suffer adverse effects as a consequence of a management action under § 7106.[54]

Here, the Union states that management's exercise of its right to determine internal-security practices affects "all employees for whom [security-camera] footage would be used to evaluate their performance."[55] According to the Union, using security-camera footage to evaluate employees' performance has the "adverse effect[s]" of interfering with communication between employees and managers, and depriving evaluating officials of the "necessary

[42] *Local 723*, 66 FLRA at 644.
[43] Resp. at 6.
[44] *See, e.g.*, *Local 723*, 66 FLRA at 644.
[45] *Compare NTEU, Chapters 243 & 245*, 45 FLRA 270, 280 (1992) (drug-testing proposals imposing procedural requirements, but retaining agency's ability to use internal-security practice of random drug testing, constituted procedures under § 7106(b)(2)), *with AFGE, Local 701, Council of Prison Locals 33*, 58 FLRA 128, 134 (2002) (where agency's determination *not* to give notice of investigations was itself an internal-security practice, proposal requiring notice not a procedure), *and Local 2143*, 48 FLRA at 45 (where rotational-shift policy was an internal-security practice, proposal requiring agency, in some circumstances, to grant shift-change requests even when inconsistent with that policy, not a procedure).
[46] Resp. at 5.
[47] 5 U.S.C. § 7106(b)(3).
[48] 5 C.F.R. § 2424.25(c)(1)(iii).
[49] 5 U.S.C. § 7106(b)(3).
[50] *AFGE, Nat'l Border Patrol Council*, 51 FLRA 1308, 1317 (1996) (*Border Patrol*).
[51] *NTEU*, 55 FLRA 1174, 1187 (1999) (*NTEU*).
[52] *E.g.*, *AFGE, Local 2755*, 62 FLRA 93, 95-96 (2007) (*Local 2755*); *Marine Eng'rs Beneficial Ass'n, Dist. No. 1 – PCD*, 60 FLRA 828, 831 (2005) (*Marine*); *Prof'l Airways Sys. Specialists*, 59 FLRA 25, 28-29 (2003) (*Airways*).
[53] *E.g.*, *NTEU*, 55 FLRA at 1187; *NAGE, Local R5-184*, 55 FLRA 549, 551-52 (1999) (*NAGE*); *NAGE, Local R14-23*, 53 FLRA 1440, 1443-44 (1998) (*Local R14-23*); *Border Patrol*, 51 FLRA at 1317, 1319.
[54] *Border Patrol*, 51 FLRA at 1319.
[55] Resp. at 6.

context . . . to accurately evaluate employee performance in a thorough and objective manner."[56] In addition, the Union claims that "[n]egative evaluations that come from management's use of . . . cameras . . . can lower employees['] overall performance ratings[,] thus [affecting] pay and career advancement."[57] And the Union asserts that Provision 1 is "intended to limit the [A]gency from using security cameras to evaluate its employees[,] and would promote interaction between employees and supervisors."[58]

In contrast, the Agency characterizes the Union's concerns about negative evaluations resulting from management's use of cameras as "purely speculative."[59] In this regard, the Agency asserts that "[t]rained dispatchers, not line managers, routinely monitor various employee work stations" and do so "primarily for employee and visitor safety and to detect criminal activity."[60]

In evaluating the Union's claims about the adverse effects addressed by Provision 1, we note that the Union does not address the possibility that, in certain instances, security-camera footage could show an employee's good performance, or refute an allegation of poor performance. And considering that Sentence 3 prohibits the Agency from using security-camera footage in performance evaluations, the Union does not explain how Sentence 2, which bans even "routine surveillance of employee duty stations,"[61] benefits employees suffering from an adverse effect flowing from management's exercise of its rights. Rather, that sentence appears only to conflict with the Agency's internal-security practice of using security cameras to "detect, document[,] and prevent criminal activity" throughout the park,[62] a practice that would benefit employee safety.

In sum, from the record before us, it is not clear that the adverse effects the Union wishes to mitigate through Provision 1 are more than speculative.[63] Moreover, even assuming that the Union's claims about the *potential* adverse effects from management's *possible* use of security cameras to appraise employee performance constitute adverse effects within the meaning of § 7106(b)(3), the Union does not address the Authority's requirement that such arrangements be sufficiently tailored. Accordingly, we conclude that the Union has not established that Provision 1 is a sufficiently tailored arrangement under § 7106(b)(3) of the Statute.[64] As such, there is no need to address whether the provision is "appropriate."[65]

Because, as discussed above, Provision 1 affects management's right to determine internal-security practices under § 7106(a)(1) of the Statute, and the Union has not established that the provision falls within an exception to management's rights under § 7106(b), we find that Provision 1 is contrary to law.

4. We grant the Union's request to sever Provision 1, and find that, of the severed subparts, only Sentence 2 is contrary to law.

The Union asks that, "[i]n the event that the Authority finds that any part of Provision 1 is contrary to law," the Authority sever and separately consider: Sentence 1; Sentence 2; and Sentences 3-4.[66]

Under § 2424.25(d) of the Authority's Regulations, a union "must support its [severance] request with an explanation of how the severed portion(s) of the . . . provision may stand alone, and how such severed portion(s) would operate."[67] If the severance request meets the Authority's regulatory requirements, then the Authority severs the provision and rules on whether each of its separate components are contrary to law.[68]

Here, the Agency does not oppose severance.[69] And as the Union's explanation of the meaning and operation of each of Provision 1's sentences demonstrates that Sentence 1, Sentence 2, and Sentences 3-4, each may operate independently, we grant the Union's severance request.[70]

The Agency does not allege that Sentence 1 is contrary to law,[71] so there is no basis for finding that Sentence 1, standing alone, is contrary to law. Accordingly, we direct the Agency to rescind its

[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] Reply at 4.
[60] Statement at 3.
[61] Pet. at 8.
[62] Statement at 5.
[63] *See, e.g.*, *Local 2755*, 62 FLRA at 95-96 (no "arrangement" under § 7106(b)(3) where adverse effects speculative); *Marine*, 60 FLRA at 831 (same); *Airways*, 59 FLRA at 29 (same); *NTEU*, 55 FLRA at 1187 (same).
[64] *E.g.*, *NTEU*, 55 FLRA at 1187; *NAGE*, 55 FLRA at 553; *Local R14-23*, 53 FLRA at 1444; *Border Patrol*, 51 FLRA at 1319.
[65] 5 U.S.C. § 7106(b)(3); *e.g. Marine*, 60 FLRA at 831-32 (citing *Airways*, 59 FLRA at 29; *NTEU*, 55 FLRA at 1187).
[66] Record at 2.
[67] 5 C.F.R. § 2424.25(d).
[68] *See Prof'l Airways Sys. Specialists*, 64 FLRA 474, 475 (2010) (*Specialists*).
[69] Reply at 9.
[70] *See, e.g.*, *Specialists*, 64 FLRA at 475.
[71] Statement at 2-3.

disapproval, to the extent that the disapproval applies to Sentence 1.

As for Sentence 2, for the reasons stated in Section III.C.1. above, we have found that Sentence 2 affects management's right to determine internal-security practices. And, for the reasons stated in Sections III.C.2. and 3, we have found that the Union has not established that Sentence 2 is a procedure under § 7106(b)(2), or an arrangement under § 7106(b)(3). Accordingly, Sentence 2 is contrary to law. So the question becomes whether Sentences 3-4 are contrary to law.

Sentence 3 prohibits the use of security cameras for "performance monitoring"[72] by preventing "management from using security[-]camera footage to appraise employee performance."[73] Sentence 4 – which, as stated previously, the Agency does not allege is contrary to law[74] – states that Provision 1 "in no way restricts" management's right to use security-camera footage to "conduct administrative or criminal investigations," to "support . . . disciplinary action[s]," "in matters referred to the Office of the Inspector General[,] . . . [or] for criminal prosecution."[75]

Thus, Sentences 3-4 – unlike Sentence 2 – do not prohibit the Agency from implementing its internal-security practice of using security cameras to "detect, document[,] and prevent criminal activity" throughout the park, including in areas where employees collect and count money.[76] Rather, the parties agree that Sentence 3 bans the Agency's use of security-camera footage in "apprais[ing] employee performance," specifically.[77] Further, Sentence 4 makes clear that the Agency remains free to use security-camera footage to "conduct administrative or criminal investigations" of employees, "support . . . disciplinary action[s]" against employees, or "in matters referred to the Office of the Inspector General . . . [or] for criminal prosecution," even where employees are involved.[78] As such, the prohibition imposed by Sentences 3-4 is narrowly limited to employee performance appraisals, and preserves the Agency's discretion to conduct surveillance and to use security-camera footage in disciplinary or criminal matters. Accordingly, we find that Sentences 3-4 do not affect management's right to determine internal-security practices under § 7106(a)(1) of the Statute.

[72] Pet. at 8.
[73] Record at 2.
[74] Statement at 2-3.
[75] Pet. at 8.
[76] Statement at 5.
[77] Record at 2.
[78] Pet. at 8.

In its reply, for the first time, the Agency asserts that Provision 1 also conflicts with management's rights to direct employees and assign work under § 7106(a)(2)(A) and (B), respectively, of the Statute.[79] However, § 2424.24 of the Authority's Regulations requires an agency to "supply *all* arguments and authorities in support of its position" that "a . . . provision is . . . contrary to law" in its *statement of position.*[80] In this regard, § 2424.24 specifically provides that an agency's statement must

> [s]et forth in full [the agency's] position on any matters relevant to the petition that [the agency] want[s] the Authority to consider in reaching its decision, including: [a] statement of the arguments and authorities supporting any . . . negotiability claims; any disagreement with claims that the exclusive representative made in the petition for review; [and] specific citation to any law, rule, regulation, . . . or other authority that [the agency] rel[ies] on.[81]

Additionally, § 2424.32(c)(1) of the Authority's Regulations cautions that an agency's "[f]ailure to raise and support an argument will, where appropriate, be deemed a waiver of such argument."[82] In this regard, § 2424.26 of the Authority's Regulations provides that the purpose of the reply is to respond to "any facts or arguments [raised] for the first time in the [union's] response."[83] Therefore, under §§ 2424.24, 2424.26, and 2424.32 of the Authority's Regulations, an agency may not raise new contrary-to-law arguments in its reply that it could have raised in its statement of position.[84]

As relevant here, the Agency's arguments, in its reply, regarding Provision 1's alleged conflict with the rights to direct employees and assign work, concern the

[79] Reply at 3.
[80] 5 C.F.R. § 2424.24(a) (emphasis added).
[81] *Id.* § 2424.24(c)(2).
[82] *Id.* § 2424.32(c)(1).
[83] *Id.* § 2424.26(a); *see also AFGE, Local 4052*, 65 FLRA 720, 721 (2011) (*Local 4052*).
[84] 5 C.F.R. §§ 2424.24(c), 2424.26(a), 2424.32(c)(1); *see* Negotiability Proceedings, 63 Fed. Reg. 66405-01, 66409 (Dec. 2, 1998) ("[U]nder § 2424.32(c)(1) . . . , the agency may not raise new arguments . . . after the filing of the statement of position. Therefore, the agency must raise and support in its statement . . . all of its . . . negotiability claims, whether or not those claims are responsive to . . . arguments made in the [union's] petition for review."); *see, e.g.*, *AFGE, Local 2139, Nat'l Council of Field Labor Locals*, 61 FLRA 654, 656 (2006) (*Local 2139*) (argument raised for the first time by agency in its reply, that is not responsive to an argument raised for the first time in a union's response, is barred).

provision's limitation on the use of surveillance-camera footage to evaluate employees' performance.[85] The parties understood, as of the conference, that Sentence 3 would "prevent . . . management from using security footage to appraise employee performance."[86] Therefore, the Agency could have asserted, in its subsequently filed statement, that Provision 1 conflicts with the rights to direct employees and assign work. Because the Agency did not do so, consistent with the foregoing discussion, the Authority's Regulations do not permit the Agency to raise these arguments for the first time in its reply.[87] Accordingly, we do not consider the Agency's arguments that Provision 1 conflicts with management's rights to direct employees and assign work under § 7106(a)(2)(A) and (B) of the Statute.

For the reasons discussed above, we find that the Agency has not established that Sentences 3-4 of Provision 1 are contrary to law. Accordingly, we order the Agency to rescind its disapproval of those sentences – as well as Sentence 1 – as severed from Sentence 2 of Provision 1.

IV. Provisions 4 and 5

A. Wording

Provision 4

> If there is a dangerous, unhealthful or potentially dangerous or unhealthful situation in any location, the first concern is for the employees and the public. Should it become necessary to evacuate a building, management will take precautions to guarantee the safety of employees and visitors. The Union will be notified in cases where an actual health and/or safety situation occurred. Once evacuated, a building will not be reopened until the Safety Officer and/or Division of Resource and Visitor Protection determine that there is no longer a danger to visitors and employees. The Health and Safety committee will be notified of the emergency at their next monthly meeting.[88]

Provision 5

> The park Safety Officer will review situations where information indicates that employees in a particular occupation are suffering from a pattern of accidents, disabling injuries and/or illnesses. Any written report will be supplied to the Health and Safety Committee.[89]

B. Meaning

The parties agree that Provision 4 is intended "to ensure that the Agency will take specific actions to address the safety of employees and visitors."[90] Only the fourth sentence of Provision 4 – "[o]nce evacuated, a building will not be reopened until the Safety Officer and/or Division of Resource and Visitor Protection determine that there is no longer a danger to visitors and employees" – is in dispute."[91]

The parties agree that Provision 5 is intended "to ensure that Safety Officers execute their duties and follow the organization's 'safety policy.'"[92] Only the first sentence of Provision 5 – stating that "[t]he park Safety Officer will review situations where information indicates that employees in a particular occupation are suffering from a pattern of accidents, disabling injuries and/or illnesses" – is in dispute.[93]

C. Analysis and Conclusions

1. Provisions 4 and 5 affect management's right to assign work.

The Agency argues that Provisions 4 and 5 are contrary to law because they affect management's right to assign work under § 7106(a)(2)(B) of the Statute.[94] The Union does not dispute – in either its petition or its response – the Agency's argument. Under § 2424.32(c)(2) of the Authority's Regulations, a party's "[f]ailure to respond to an argument or assertion raised by the other party will . . . be deemed a concession to such

[85] *See* Reply at 5-6.
[86] Record at 2.
[87] 5 C.F.R. §§ 2424.24(c), 2424.26(a), 2424.32(c)(1); *Local 2139*, 61 FLRA at 656.
[88] Pet. at 19.
[89] *Id.* at 22.
[90] Record at 3.
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] Statement at 13, 16.

argument or assertion."[95] Consistent with this regulation, where, as here, a union does not respond to an agency's claim that a provision affects the exercise of a management right, the Authority will find that the union concedes that the provision affects the claimed management right.[96] Thus, we find that the Union concedes that Provisions 4 and 5 affect management's right to assign work.

2. The Union does not establish that Provisions 4 and 5 concern permissive subjects of bargaining under § 7106(b)(1) of the Statute.

The Union argues that Provisions 4 and 5 concern permissive subjects of bargaining under § 7106(b)(1).[97] If the Union is correct that the provisions concern § 7106(b)(1) matters, then the Agency head was not permitted to disapprove the provisions.[98]

The Union specifically contends that Provisions 4 and 5 concern permissive subjects of bargaining under § 7106(b)(1) because they "include numbers and types."[99] Under § 2424.25(c)(1) of the Authority's Regulations, the Union must set forth its arguments and authorities supporting any assertion that a provision falls within an exception to management rights, including "[w]hether and why the . . . provision concerns a matter negotiable at the election of the agency under . . . [§] 7106(b)(1)."[100]

Under § 7106(b)(1), as relevant here, an agency may elect to negotiate on the "numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty."[101] When determining whether a provision is within the scope of § 7106(b)(1), the Authority assesses whether the provision relates to all three elements: "(1) the numbers, types, and grades; (2) of employees or positions; (3) assigned to any organizational subdivision, work project, or tour of duty."[102] In this regard, the phrase "numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty" in § 7106(b)(1) applies to the establishment of agency staffing patterns, or the allocation of staff, for the purpose of an agency's organization and the accomplishment of its work.[103]

Although the Union asserts generally that Provisions 4 and 5 concern "numbers" and "types,"[104] it does not explain these assertions. Further, the Union fails to explain how the provisions relate to any organizational subdivision, work project, or tour of duty, even though the Union has the burden to do so under § 2424.25(c)(1)(i) of the Authority's Regulations.[105] Therefore, we find that the Union has not demonstrated that Provisions 4 and 5 concern permissive subjects of bargaining under § 7106(b)(1). The Union does not allege that Provisions 4 and 5 are procedures under § 7106(b)(2) or appropriate arrangements under § 7106(b)(3), and therefore we do not address those provisions of the Statute.[106] Accordingly, because Provisions 4 and 5 affect management's right to assign work under § 7106(a)(2)(B) of the Statute, and the Union has not established that the provisions fall within an exception to management's rights under § 7106(b), Provisions 4 and 5 are contrary to management's right to assign work under § 7106(a)(2)(B).

Additionally, we note that the Union argues that the Agency elected to negotiate Provisions 4 and 5 because: (1) there are identical provisions in the parties' previous collective-bargaining agreement;[107] and (2) the Agency effectively put forth Provisions 4 and 5 as its proposals at the bargaining table when Agency negotiators presented the parties' previous agreement as the Agency's counter-proposals.[108] As to the Union's first argument, it is well settled that the parties' inclusion of an identical provision in a previous agreement does not render a provision negotiable.[109] And, as to the second argument, the Union provides no basis for finding that the identity of the party who put forth a proposal at the bargaining table is relevant to negotiability. Therefore,

[95] 5 C.F.R. § 2424.32(c)(2).
[96] *E.g.*, *AFGE, Local 1938*, 66 FLRA 1038, 1040 (2012) (citing *AFGE, Local 1164*, 65 FLRA 924, 926 (2011); *Local 4052*, 65 FLRA at 722); *AFGE, Local 1968*, 63 FLRA 481, 483 (2009) (citing *NLRB Union, NLRB Prof'l Ass'n*, 62 FLRA 397, 401-03 (2008), *aff'd sub nom. NLRB Union v. FLRA*, 313 Fed. Appx. 328 (D.C. Cir. 2009)); *AFGE, Local 1226*, 62 FLRA 459, 460 (2008).
[97] Resp. at 20-22, 28-30.
[98] *NATCA, AFL-CIO*, 61 FLRA 336, 338 (2005) (citing *U.S. Dep't of Commerce, Patent & Trademark Office*, 54 FLRA 360, 375 (1998) (provisions relating to § 7106(b)(1) matters are not subject to disapproval on agency-head review unless they are otherwise inconsistent with applicable law, rule, or regulation)).
[99] Resp. at 22, 28.
[100] 5 C.F.R. § 2424.25(c)(1)(i); *see also Local 723*, 66 FLRA at 645.
[101] 5 U.S.C. § 7106(b)(1).
[102] *Local 723*, 66 FLRA at 645 (citing *NAGE, Local R5-184*, 51 FLRA 386, 394 (1995)); *see also AFGE, Local 1336*, 52 FLRA 794, 802 (1996).
[103] *Local 723*, 66 FLRA at 645.
[104] Resp. at 22, 28.
[105] 5 C.F.R. § 2424.25(c)(1)(i); *see also Local 723*, 66 FLRA at 645.
[106] *E.g.*, *NATCA, AFL-CIO*, 61 FLRA 336, 338 (2005).
[107] Resp. at 20, 22, 28, 30.
[108] *Id.*
[109] *AFGE, Local 1900*, 51 FLRA 133, 135 (1995) (citing *NFFE, Local 2058*, 38 FLRA 1389, 1404 (1991)).

the Union's arguments provide no basis for finding that Provisions 4 and 5 are lawful.

For the foregoing reasons, we find that Provisions 4 and 5 are contrary to law.

V. Provision 6

A. Wording

> An employee may be granted leave without pay to engage in Union activities, to work in programs sponsored by the Union or the AFL-CIO, upon written request by the appropriate Union office. Such requests will be referred to the appropriate management official and will normally be approved. Such employees shall continue to accrue benefits in accordance with applicable OPM regulations. Leave without pay for this purpose is limited to one (1) year, but may be extended or renewed upon proper application.[110]

B. Meaning

Only the second sentence of Provision 6 is in dispute, and the parties dispute the meaning of that sentence.[111] Where parties dispute the meaning of a provision, the Authority looks to the provision's plain wording and any union statement of intent.[112] If the union's explanation is consistent with the provision's plain wording, then the Authority adopts that explanation for the purpose of assessing the provision's legality.[113] We note that the meaning that the Authority adopts in resolving a negotiability dispute applies in other proceedings – including arbitration – unless modified by the parties through subsequent agreement.[114]

The second sentence of Provision 6 states, in pertinent part, that written requests for leave without pay (LWOP) in order to engage in certain activities "will be referred to the appropriate management official and will normally be approved."[115] The parties disagree over the extent to which the phrase "will normally be approved" limits the Agency's ability to deny requests for LWOP. Specifically, the Agency claims that the provision requires the Agency to "normally" grant requests for LWOP without regard for the operational needs of the Agency.[116] But the Union explains that the provision "does not require the [A]gency to grant requests for [LWOP] without regard to the necessity for the [requesting] employee's services."[117] Thus, the Union contends that Provision 6's use of the word "normally" preserves the Agency's discretion to disapprove LWOP requests based on the Agency's need for the requesting employee's services.[118] And, relatedly, the Authority has previously adopted a union's explanation that provisions that required an agency to hold a discussion with an employee "normally" within ten days from the agency's decision to impose discipline preserved the agency's discretion to wait longer than ten days or to decide not to hold the discussion at all.[119]

The Union's explanation of the provision's meaning is consistent with the provision's plain wording. Therefore, consistent with the principles set forth above, we adopt that meaning.[120]

C. Analysis and Conclusion: The Agency does not establish that Provision 6 is contrary to § 7106(a)(2)(B) of the Statute.

The Agency argues that Provision 6 affects management's right to assign work under § 7106(a)(2)(B) of the Statute by requiring that the Agency "normally" grant requests for LWOP "without regard to the necessity [of] the [requesting] employee's services."[121] But we have found that Provision 6 would preserve the Agency's discretion to disapprove LWOP requests based on the Agency's need for the requesting employee's services. Accordingly, the Agency's argument is based on a misinterpretation of the meaning and operation of Provision 6, and the argument provides no basis for finding Provision 6 contrary to § 7106(a)(2)(B).[122] Therefore, we order the Agency to rescind its disapproval of Provision 6.

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[110] Pet. at 25.
[111] Record at 3.
[112] *E.g.*, *NAIL, Local 7*, 67 FLRA 654, 655 (2014) (citing *NAGE, Local R-109*, 66 FLRA 278, 278 (2011)).
[113] *See, e.g.*, *id.*
[114] *NATCA*, 64 FLRA 161, 161 n.2 (2009); *Ass'n of Civilian Technicians, Volunteer Chapter 103*, 55 FLRA 562, 564 n.9 (1999); *Nat'l Educ. Ass'n, Overseas Educ. Ass'n, Laurel Bay Teachers Ass'n*, 51 FLRA 733, 741 n.8 (1996).
[115] Pet. at 25.
[116] Statement at 18.
[117] Pet. at 25; *see also* Record at 3 (Provision 6 "[does] not prohibit the Agency from considering the necessity of the employee's service prior to approving" LWOP).
[118] *See* Pet. at 25; Record at 3; Resp. at 36.
[119] *Local 3, IFPTE*, 25 FLRA 714, 721 (1987).
[120] *See, e.g.*, *id.* at 721-22 (Authority determined that use of the term "normally" indicated that the agency retained discretion).
[121] Statement at 18.
[122] *See, e.g.*, *NTEU*, 52 FLRA 1265, 1277-78 (1997) (rejecting agency's arguments that were based on misinterpretation of meaning and operation of provision).

VI. Provision 3

A. Wording

Article 5 Section 3 – Management Responsibilities

It is the responsibility of management to:

B. Ensure that bargaining unit employees who are transferred, reassigned or otherwise relocated between the NERO unit and the INDE unit will remain on dues withholding, provided they are moving into a bargaining unit position.[123]

B. Meaning

The Union explains that "NERO" means the Northeast Regional Office and "INDE" means the Independence National Historical Park – two separate bargaining units, both represented by the Union.[124] The parties agree that the provision would require the Agency to continue deducting union dues, without interruption, for an employee who transfers out of one bargaining unit and into the other unit,[125] in order to limit the amount of paperwork required by the employee.[126]

C. Analysis and Conclusion: Provision 3 conflicts with § 7115(b)(1) of the Statute.

The Agency argues[127] that Provision 3 is contrary to § 7115(b)(1) of the Statute.[128] Section 7115(b)(1) provides that an agency must stop automatically deducting union dues for any employee when "the agreement between the agency and the exclusive representative involved ceases to be applicable to the employee."[129] In regard to dues withholding under § 7115, the Authority has found that an agreement ceases to be applicable to an employee when the employee transfers out of the bargaining unit.[130]

According to the Agency, because NERO and INDE are separate bargaining units, § 7115(b)(1) does not permit management to continue deducting union dues from the pay of a transferred employee unless the employee executes a new standard-form 1187, "Request for Payroll Deductions for Labor Organization Dues" (SF-1187).[131] The Union argues that Provision 3 does not conflict with § 7115(b)(1) because: NERO and INDE are serviced by the same payroll and human-resources offices and union officers; the units are geographically close to each other; and there is no break in relationship between the Agency and the employee when an employee transfers units.[132] The Agency does not dispute these facts, but argues that § 7115(b)(1) requires that the *employee* who is transferred, reassigned, or otherwise relocated to a new bargaining unit has the right to choose whether he or she wishes to have union dues automatically deducted for the new bargaining unit, regardless of whether both units are under the same local and are serviced by the same human-resources department.[133]

The Agency's interpretation of § 7115(b)(1) is consistent with Authority precedent finding that when an employee leaves a bargaining unit with the expectation that the departure is permanent, then the employee "is entitled to the widest possible discretion in resuming obligations [that] were purely discretionary."[134] In this regard, the Authority has found that an agency may not begin automatically deducting union dues once an employee is in a new bargaining unit unless the employee executes a new SF-1187 authorizing the deduction.[135] In contrast, the Authority has found that when an employee leaves a bargaining unit with the expectation that the departure is only temporary (as in a detail), an agency must stop automatically deducting union dues while the employee is out of the bargaining unit, but may resume deducting union dues without the employee executing a new SF-1187 once the employee returns to the unit.[136] Here, there is no claim, or basis for finding, that Provision 3 applies only to temporary transfers.

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[123] Pet. at 16.
[124] Record at 2.
[125] Pet. at 16; Statement at 8.
[126] Record at 2.
[127] Statement at 9.
[128] 5 U.S.C. § 7115(b)(1).
[129] *Id.*
[130] *IAMAW, Lodge 2424*, 25 FLRA 194, 195, 197-98 (1987) (*Lodge 2424*).
[131] Statement at 9.
[132] Resp. at 12.
[133] Statement at 8.
[134] *VA & VA Med. Ctr., Northport, N.Y.*, 25 FLRA 523, 529 (1987) (finding that upon a wrongly terminated employee's reinstatement to a bargaining-unit position, the employee must have the option of executing a new SF-1187, not the automatic reinstatement of automatic dues deduction).
[135] *Id.*
[136] *Lodge 2424*, 25 FLRA at 195 (citing *IRS, Fresno Serv. Ctr., Fresno, Cal.*, 7 FLRA 371, 372-73 (1981)) (when the expectation is for the temporarily detailed employee to return to the bargaining unit, dues deduction must be terminated upon leaving the unit, but may resume without a new SF-1187 upon the employee's return).

Consistent with the foregoing, by prohibiting the Agency from observing a transferred employee's discretion to resume or discontinue dues deductions, Provision 3 requires the Agency to violate the plain wording of § 7115(b)(1). And the Union provides no basis for finding that the factors that it cites – the units' shared payroll, human-resources offices, and union officers; the units' geographic proximity; and the unbroken relationship between the Agency and the transferred employee[137] – are relevant here. In this regard, while those types of factors might be relevant in certain non-negotiability contexts, such as when the Authority must determine whether two units should be consolidated,[138] the Union cites no authority for the proposition that those factors have any relevance in a negotiability dispute, or to the application of § 7115(b)(1). Therefore, because NERO and INDE are distinct bargaining units, "the agreement between the [A]gency and the [Union] . . . ceases to be applicable to" an employee who leaves one unit, and the employee's "allotment . . . for the deduction of dues . . . shall terminate."[139] At that point, § 7115(b)(1) *requires* the Agency to stop deducting Union dues for that employee, even if the employee then joins the other unit.[140] Accordingly, we find that Provision 3 is contrary to § 7115(b)(1) of the Statute.

The Union also argues that Provision 3 concerns a matter negotiable at the election of the Agency under § 7106(b)(1) of the Statute,[141] and is a procedure under § 7106(b)(2) of the Statute.[142] However, a provision that is contrary to law remains so regardless of whether it pertains to a permissive subject of bargaining under § 7106(b)(1),[143] or is a procedure under § 7106(b)(2).[144] Therefore, the Union's arguments provide no basis for finding that Provision 3 is consistent with law.

VII. Decision

We order the Agency to rescind its disapproval to the extent that its disapproval applies to: Sentence 1, and Sentences 3-4, of Provision 1 (as severed from Sentence 2 of Provision 1); and Provision 6. We dismiss the Union's petition as to: Provision 1 as a whole; Sentence 2 as severed from the rest of Provision 1; and Provisions 3, 4, and 5.

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[137] Resp. at 12.
[138] *E.g.*, *U.S. Dep't of Interior, Bureau of Land Mgmt., Phoenix, Ariz.*, 56 FLRA 202, 205 (2000); *U.S. Dep't of the Air Force, Air Force Materiel Command, Wright-Patterson Air Force Base, Ohio*, 55 FLRA 359, 361-62 (1999).
[139] 5 U.S.C. § 7115(b).
[140] *See, e.g.*, *Lodge 2424*, 25 FLRA at 195-96.
[141] Resp. at 12.
[142] *Id.* at 14-15.
[143] *NAGE, Local R1-109*, 61 FLRA 588, 590 (2006) (explaining that a subject negotiable at the election of the agency is outside the duty to bargain if it is contrary to law).
[144] *AFGE, Local 1547*, 65 FLRA 911, 917 n.11 (2011); *NTEU*, 55 FLRA at 1181.

Member Pizzella, concurring, in part, and dissenting, in part:

Without a doubt, the Liberty Bell and Independence Hall, where George Washington was appointed Commander and Chief of the Continental Army, the Declaration of Independence was adopted, and the U.S. Constitution was drafted, are two of our nation's most beloved treasures. More than 2.3 million tourists visited in fiscal year 2013.[1]

Sadly, however, because these landmarks carry both historical and symbolic significance, they are constantly at risk and have been targeted by hooligans seeking to damage them for more than two hundred years, and by more-sophisticated terrorists since 2002.[2]

AFGE, Local 2058 (Local 2058) represents the security guards who work at the Independence National Historical Park in Philadelphia, Pennsylvania, and are charged with preserving and protecting the Park's treasures, including Independence Hall and the Liberty Bell.[3] It should come as no surprise to anyone that the National Park Service (NPS) deemed it necessary to install 155 security cameras to monitor the areas in, and around, these national treasures.[4] The cameras are therefore a "critical component" of the NPS's internal-security program.[5] And, precisely because the cameras are used to help protect the treasures from harm and "to detect, document[,] and prevent" criminal activity, the cameras not only scan public areas where visitors are permitted but their use was expanded to areas "where government funds are collected or counted," as well as "employee[-]only" areas such as break rooms and locker rooms.[6]

Even Local 2058 does not dispute that the NPS has the right to determine internal-security practices under 5 U.S.C. § 7106(b)(1) and that the use of the cameras is a right that is reserved to the NPS under that provision. Nonetheless, in Provision 1, Local 2058 proposes that the NPS may not use security cameras: "1. . . . in restrooms or locker rooms . . . [;] 2. . . . for routine surveillance of employees at duty stations or break areas[;] [or] 3. . . . for performance monitoring."[7]

On the one hand, Local 2058 acknowledges that the NPS has the right to protect the Liberty Bell and Independence Hall from the potential harm that may come from visitors in public areas. But, on the other hand, Local 2058 does not agree that the NPS should have the right to ensure that criminal activity does not occur in areas that are reserved primarily for guards or when poor performance or misconduct is recorded by security cameras in a public area. To that end, Proposal 1 would preclude the NPS from holding accountable any guard who is observed on camera stealing money when the camera is located in an area that is used primarily by guards. Proposal 1 would also prevent the NPS from holding accountable a guard who would be observed, by a security camera in a public area that is "used for routine surveillance[.]"[8]

Local 2058 would have us believe that any threats to these national monuments would only be perpetrated by the visiting public. But that is not the case. Unfortunately, threats to the monuments also originate from persons who have direct or indirect access to the non-public areas that Local 2058 does not want to be observed by security cameras, such as tour guides,[9] as well as *guards and other NPS employees*.[10]

The majority concludes, and I agree, that Provision 1 is contrary to the right of the NPS to determine its internal-security practices under § 7106(b)(1).

We part ways, however, because the majority goes on to conclude that the provision may be severed into four individual subparts (referred to by the majority as "sentences")[11] and that sentences 1 and 3 are not contrary to the internal-security rights of the NPS.

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[1] Independence Visitor Center, *FY 2013 Annual Report*, 2, http://phlvisitorcenter.com/sites/default/files/upload/pdf-upload/IVCC_AR_2013-pages_FINAL.pdf (last visited Jun. 3, 2015).

[2] *See Chambers v. Dep't of the Interior*, 103 M.S.P.R. 375, 378 (2006) ("[C]ounterterrorism study" concluded that national monuments protected by the NPS are "vulnerable to attack."); CBS Staff, *A Threat to Liberty*, (Feb. 21, 2002), http://www.cbsnews.com/news/a-threat-to-liberty/; John Shiffman, *Man Accused of bomb threats against Independence Hall*, The Philadelphia Inquirer (Jan. 28, 2006). http://www.highbeam.com/doc/1G1-141396199.html .

[3] Statement at 5.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] Pet. at 8.

[8] *Id.*

[9] *Man accused of bomb threats against Independence Hall*, http://www.highbeam.com/doc/1G1-141396199.html. ("A horse-carriage driver who worked near the Liberty Bell was charged . . . with phoning 28 bomb threats against Independence Hall.")

[10] *Hovanec v. Dep't. of the Interior*, 67 M.S.P.R. 340, 342 (1995) (Department of Interior employee, charged with safeguarding irreplaceable fossils, pleaded guilty to stealing, selling, and transporting them); *Belk v. Dep't of the Interior*, 57 M.S.P.R. 528, 529 (1993) (Member Slavet dissenting) (Searches of houses of NPS employees, pursuant to federal search warrant, discover large quantities of items stolen from NPS facilities).

[11] Majority at 9.

History records that Confuscius once said that "[t]he beginning of wisdom is to call things by their proper names." Therefore, as I have noted before, I am troubled by how readily the Authority severs into separate parts provisions that are proposed as a whole, even when the severed parts no longer resemble the union's original proposal.[12] Here, the majority reformats Provision 1 so extensively that it no longer looks at all like the proposal that was originally submitted by Local 2058.

Provision 1 originally proposed that security cameras will not be: "***1.*** . . . located in restrooms or locker rooms . . . [;] . . . ***2.*** . . . used for routine surveillance of employees at duty stations or break areas[;] [or] ***3.*** . . . used for performance monitoring."[13] However, Provision 1 also included an "*unnumbered paragraph*"[14] which, according to Local 2058, "would not make any sense without . . . [sentences] 1, 2, or 3"[15] and simply explained that none of the "relevant provisions" of Proposal 1 could "restrict[] management's rights."[16]

I have every confidence that Local 2058 knew what it was doing, and what it meant, when it constructed this provision. But, the majority apparently does not share my confidence. Instead, my colleagues treat the "unnumbered" paragraph as though it was a forgotten step-child of the Provision 1 family that needs to be adopted and given a family name. According to the majority, it should be named "[s]entence 4."[17]

Even if I were to assume that the numbered sentences could be severed (a point with which I do not agree), I would still conclude that sentences 1 and 3 are contrary to the right of the NPS to determine internal-security practices.

I would also conclude that sentence 3 interferes with the right of the NPS to direct employees and assign work under § 7106(a)(2)(A) and (B). According to the majority, the NPS did not argue that sentence 3 interferes with the right of NPS to direct employees and assign work.[18] But the majority is wrong on this point. In its statement of position, the NPS argued that supervisors have the obligation to monitor subordinates' performance and that "an employee's performance of their duties is not a matter of privacy."[19]

It is also apparent to me that Provision 6 – leave without pay (LWOP) "requests . . . will *normally* be approved" − interferes with the right of the NPS to assign work. The term "normally" implies that such requests *must be granted* "without regard to the operational needs [of the NPS]."[20] Local 2058 argues that the provision "*does not require*" the NPS to grant requests for LWOP.[21]

But that argument is not supported by the Authority's precedent. The use of this vague determinative opens the door for Local 2058 to challenge a supervisor each and every time a supervisor denies any request for LWOP. The use of terms such as "normally," "typically," and "to the extent possible," serve as the starting point for many disputes that end up as grievances and ultimately lead to arbitration.[22]

The majority asserts that the proposal is negotiable because it "*preserves* the [NPS's] *discretion*" to approve or disapprove LWOP requests.[23] In reality, however, the "discretion" which is left to the NPS is a "Hobson's choice"[24] at best. Using the term "normally" as a determinative in this context effectively *forces the NPS to grant* any LWOP request "without regard [to its] operational needs."[25] Therefore, the majority may be correct that the supervisor technically has the discretion to deny such a request, but, if history is an accurate predictor of the future, the choice is not a real choice. Any request that is denied will likely generate a dispute, and ultimately a grievance.

Such a result runs counter to the mandate of the Federal Service Labor-Management Relations Statute[26] that collective-bargaining agreements must contribute to "the effective conduct of government business" and "bring[] [a] sense of finality [and] predictability" into the

[12] *AFGE, SSA Gen. Comm.*, 68 FLRA 407, 415 (2015) (Dissenting Opinion of Member Pizzella) ("But without its ultimate section, the result is more akin to an existentialist play.").
[13] Pet. at 8 (emphasis added).
[14] Union's Response at 10 (emphasis added.)
[15] *Id.*; s*ee also* Record at 2.
[16] Pet. at 8.
[17] Majority at 9.
[18] *Id.* at 10-11.
[19] Statement at 5.
[20] Pet. at 25.
[21] Response at 34.
[22] *Dep't of HHS, SSA & SSA Field Operations, N.Y. Region*, 23 FLRA 891, 902 (1986) ("normally be approved"); *Dep't of HHS, SSA*, 25 FLRA 479 (1987); *AFGE, Local 1409*, 38 FLRA 747, 748-751 (1990) ("normally be approved"); *U.S. Dep't of the Treasury, Customs Serv., Hous., Tex.*, 41 FLRA 485, 488 (1991) ("normally be approved"); *U.S. Dep't of the Air Force, 72nd Mission Support Grp., Tinker Air Force Base, Okla.*, 60 FLRA 432 (2004) ("under normal circumstances"); *NTEU*, 64 FLRA 65, 65 (2009) ("to the extent possible").
[23] Majority at 16 (emphasis added).
[24] Hobson's choice, Wikipedia (May 11, 2015), http://en.wikipedia.org/wiki/Hobson's_choice.
[25] Statement at 20.
[26] 5 U.S.C. §§ 7101-7135.

relationship between federal unions, employees, and agencies.[27]

Accordingly, I agree with the majority that Provisions 1, 3, 4, 5, and sentence 2 of Provision 1 are not negotiable. I disagree, however, that the other severed parts of Provision 1 (which the majority characterizes as sentences 1, 3, and 4) and Provision 6 are negotiable (even if it was appropriate to sever) for the reasons discussed above.

Thank you.

[27] *U.S. DOJ, Fed. BOP, Corr. Inst. Williamsburg, Salters, S.C.*, 68 FLRA 580, 585 (2015) (Dissenting Opinion of Member Pizzella) (internal brackets omitted) (citing *AFGE, Local 1164*, 67 FLRA 316, 320 (2014) (Member Pizzella dissenting)).